A **WOOLLEY DEVELOPMENT SDN BHD**

v.

STADCO SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
KN SEGARA JCA
JEFFREY TAN JCA
[CIVIL APPEAL NO: W-02-753-2002]
C 21 JUNE 2010

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, setting aside - Injunction restraining appellant from dealing with lands forming subject matter of sale and purchase agreements made between respondent* D *and first defendant - Conspiracy to defraud - Privity of contract - Bona fide serious issues - Whether damages an adequate remedy*

CONTRACT: *Privity - Sale and purchase agreement - Appellant restrained from dealing with lands forming subject matter of sale and* E *purchase agreements made between respondent and first defendant - Whether respondent could sustain any claim against appellant based on a contract between appellant and first defendant*

LAND LAW: *Restraints on dealings - Injunction - Injunction restraining appellant from dealing with lands forming subject matter of sale and* F *purchase agreements made between respondent and first defendant - Conspiracy to defraud - Privity of contract - Bona fide serious issues - Whether damages an adequate remedy*

TORT: *Conspiracy - Conspiracy to defraud - Injunction restraining* G *appellant from dealing with lands forming subject matter of sale and purchase agreements made between respondent and first defendant - Privity of contract - Bona fide serious issues - Whether damages an adequate remedy*

H This appeal by the appellant/second defendant arose out of an injunction issued by the High Court against both defendants restraining them from dealing with certain lands which formed the subject matter of 192 sale and purchase agreements dated 6 January 1997 made between the respondent and the first defendant. The second defendant was not a party to those 192 agreements. The first I defendant, who was supposed to build and transfer 192 units of

shop-offices to the respondent within 36 months, defaulted. In other words, by the time the 36-month period stipulated in the agreement for the first defendant to complete construction expired on 5 January 2000, the whole project was in reality an abandoned project. All parties admitted that at all material times the first defendant's lands for the project were charged to Malaysia Building Society Berhad ('MBSB').

Held (allowing the appeal with costs)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) There was no nexus between the appellant and the respondent. This was as clear as daylight because the appellant entered the scene after the 36-month period stipulated in the agreements between the respondent and the first defendant had expired on 5 January 2000. The first contract involving the appellant in the said project was in September 2000. There was never any contract made between the appellant and the respondent.

(2) The respondent's allegation of "conspiracy to defraud" against the appellant was based solely on the fact that the appellant had entered into conditional contracts with the first defendant for the first defendant to transfer its lands to the appellant, and that there were other contracts made between the appellant, the first defendant and MBSB. Those contracts made between the first defendant and third parties could not have given the respondent any cause of action against those third parties *ie*, the appellant or MBSB. All that the respondent had was a straightforward case against the first defendant for breach of contract. It had no plausible cause of action against the appellant or MBSB.

(3) On the facts, unless the respondent had some other undisclosed evidence to adduce, it simply could not sustain any claim against the appellant based on a contract made between the appellant and the first defendant. There was no privity of contract to enable the respondent to rely on contracts made between the first defendant and third parties – which were not intended to benefit the respondent.

(4) Having considered the respondent's case based on its own statement of claim and affidavits, this court arrived at the inevitable conclusion that the respondent had failed to show *bona fide* serious issues for trial to justify an interlocutory

injunction. Further, damages were obviously an adequate remedy since the respondent's cause of action against the second defendant was based solely on an allegation of "conspiracy to defraud". It is trite law that no interlocutory injunction ought to be issued in this kind of situation.

[Order accordingly.]

Bahasa Malaysia *Translation*

Rayuan ini oleh perayu/defendan kedua berbangkit dari suatu injunksi yang dikeluarkan oleh Mahkamah Tinggi terhadap kedua-dua defendan-defendan menghalang mereka dari menggunakan tanah-tanah tertentu yang membentuk isi 192 perjanjian-perjanjian jualbeli bertarikh 6 Januari 1997 yang dibuat di antara responden dan defendan pertama. Defendan kedua bukan merupakan pihak kepada 192 perjanjian tersebut. Defendan pertama, yang sepatutnya membina dan memindah 192 unit pejabat kedai kepada responden dalam masa 36 bulan, memungkiri perjanjian. Dalam kata-kata lain, apabila jangka masa 36 bulan yang dinyatakan dalam perjanjian untuk defendan pertama menyempurnakan binaan telah tamat pada 5 Januari 2000, seluruh projek tersebut telah menjadi sesuatu projek yang terbiar. Kesemua pihak mengakui bahawa pada semua masa material tanah-tanah untuk projek tersebut yang dimiliki oleh defendan pertama telah digadaikan kepada Malaysia Building Society Berhad ('MBSB').

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Tiada apa-apa nexus di antara perayu dan responden. Ini sememangnya sungguh jelas kerana perayu muncul selepas jangka masa 36 bulan yang dinyatakan dalam perjanjian-perjanjian di antara responden dan defendan pertama telah tamat pada 5 Januari 2000. Kontrak pertama yang melibatkan perayu dalam projek tersebut adalah pada September 2000. Tidak pernah ada apa-apa kontrak yang dimeterai di antara perayu dan responden.

(2) Pengataan "konspirasi untuk memfrod" oleh responden terhadap perayu hanya berdasarkan fakta bahawa perayu telah membuat kontrak-kontrak bersyarat dengan defendan pertama untuk defendan pertama memindahkan tanah-tanahnya kepada perayu,

dan terdapat kontrak-kontrak lain yang dibuat di antara perayu, defendan pertama dan MBSB. Kontrak-kontrak tersebut yang dibuat oleh defendan pertama dan pihak ketiga tidak dapat memberikan responden apa-apa kausa tindakan terhadap pihak ketiga tersebut, iaitu, perayu atau MBSB. Apa yang responden hanya ada ialah suatu kes jelas dan mudah terhadap defendan pertama bagi pelanggaran kontrak. Ia tidak mempunyai kausa tindakan yang munasabah terhadap perayu atau MBSB.

(3) Berdasarkan fakta-fakta, kecuali responden mempunyai keterangan tidak diketahui lain untuk dikemukakan, ia nyata tidak dapat mengekalkan apa-apa tuntutan terhadap perayu berasaskan suatu kontrak yang dibuat di antara perayu dan defendan pertama. Tidak ada priviti kontrak untuk membolehkan responden bergantung atas kontrak-kontrak yang dibuat di antara defendan pertama dan pihak ketiga – yang tidak diniatkan untuk memanfaatkan responden.

(4) Setelah menimbangkan kes responden berdasarkan pernyataan tuntutannya dan afidavit-afidavitnya sendiri, mahkamah ini mencapai kesimpulan yang tidak dapat dielakkan bahawa responden telah gagal menunjukkan isu-isu serius *bona fide* untuk perbicaraan yang menjustifikasikan suatu injunksi interlokutori. Lagipun, gantirugi jelas merupakan remedi yang mencukupi kerana kausa tindakan responden terhadap defendan kedua hanya berasaskan suatu pengataan "konspirasi untuk memfrod". Ia adalah undang-undang nyata bahawa injunksi interlokutori tidak sepatutnya dikeluarkan dalam situasi begini.

[Diperintah sedemikian.]

Case(s) referred to:

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & 2 Ors [1995] 1 CLJ 293 CA ***(refd)***

Saw Seng Kee v. Director of Lands & Mines, Penang & Ors.; Teoh Han Che v. Director of Lands & Mines, Penang & Ors [1986] 1 LNS 77 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19

For the appellant - Gan Techiong; M/s Gan & Lim
For the respondent - Pang Kong Leng; M/s Cheah Teh & Su

[Appeal from High Court, Kuala Lumpur; Suit No: S6-22-206-2002]

Reported by Suresh Nathan

A

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

B **[1]** The appellant in this appeal is the second defendant in the High Court below. The appeal arose out of an injunction issued by the High Court against both defendants, to restrain both defendants from dealing with some lands in Seberang Prai, Penang, forming the subject matter of 192 Sale and Purchase Agreements dated
C 6 January 1997 made between the respondent and the first defendant. It is appropriate at the outset to point out that the second defendant was not a party to those 192 Agreements.

[2] At the conclusion of the hearing, we unanimously allowed the
D appellant's appeal with costs and ordered the interlocutory injunction to be set aside as against the appellant. In other words, the interlocutory injunction remains in force against the first defendant in the civil suit.

E **[3]** There were two main grounds for us deciding to allow the appellant's appeal. First, we were of the view that the respondent had a reasonable cause of action only against the first defendant and have failed to show any *bona fide* serious issue for trial *vis-à-vis* the second defendant. It is trite law that no interlocutory injunction
F ought to be granted if the applicant for an injunction fails to show any *bona fide* serious issue for trial. Secondly, the respondent's alleged cause of action against the second defendant was based on an allegation of "conspiracy to defraud". Since damages are obviously adequate remedy in a claim based on the tort of
G "conspiracy to defraud", no interlocutory injunction ought to be have been granted by the High Court against the second defendant. See *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & 2 Ors* [1995] 1 CLJ 293.

The Facts

H

[4] Briefly, the salient facts of the case are as follows. The respondent is a private limited company. In its statement of claim, it pleaded having entered into 192 Sale and Purchase Agreements with the first defendant, a company by the name of Cherating
I Development Sdn Bhd on 6 January 1997 wherein the first

defendant promised to build and transfer 192 units of shop-offices in Seberang Prai, Penang to the respondent within 36 months. Only one out of the 192 Agreements was exhibited in the respondent's affidavit in the High Court below in support of their application for the said injunction. Be that as it may, learned counsel submitted that it was a standard contract and could be presumed that the other 191 Agreements contained the same terms and conditions. The main term was that the purchase price was to be paid in instalments according to the progress of the construction undertaken by the first defendant. It is to be noted, at this juncture, that the first defendant's land was vacant land and 192 shop offices were supposed to be on different floors of some four-storey buildings (ground floor to third floor) – which were never constructed because the first defendant defaulted in carrying out construction. In other words, by the time the 36 months period stipulated in the agreement for the first defendant to complete construction expired on 5 January in the new millennium, ie, year 2000, the whole project was in reality an abandoned project. It is a fact admitted by all parties that at all material times – even to this day – the first defendant's lands for that project are charged to Malaysia Building Society Berhad ("MBSB").

Analysis

[5] We are of the view that learned counsel for the appellant was right to point out that there was no nexus between the appellant and the respondent. This is clear as daylight because the appellant entered the scene after the 36 months period stipulated in the agreements between the respondent and the first defendant had expired on 5 January 2000. The first contract involving the appellant in the said project was in September 2000. There was never any contract made between the appellant and the respondent. In basic legal terms, there was never in existence any privity of contract between them.

[6] The respondent's cause of action against the appellant was based on an allegation of "conspiracy to defraud". On what basis did the respondent make this serious allegation against the appellant? Bearing in mind the irrefutable fact that the appellant and the respondent were total strangers, we could not avoid the conclusion that the respondent's allegation was far-fetched. During the course of submission, my learned brother KN Segara, JCA

observed that the appellant could apply to strike out the respondent's claim under O. 18 r. 19 of the Rules of the High Court 1980 ("RHC"). This was so obvious because whilst the respondent had a case against the first defendant for breach of contract, the respondent's allegation of "conspiracy to defraud" was based solely on the fact that the appellant had entered into conditional contracts with the first defendant for the first defendant to transfer its lands to the appellant, and that there were other contracts made between the appellant, the first defendant and MBSB. My learned brother Jeffrey Tan Kok Wha, JCA was quick to point out that those contracts made between the first defendant and third parties could not have given the respondent any cause of action against those third parties, ie, the appellant or MBSB. All that the respondent had was a straightforward case against the first defendant for breach of contract. The respondent had no plausible cause of action against the appellant or against MBSB.

[7] The respondent had alleged in its supporting affidavit affirmed by its director, one Tan Aik Teck, that four cheques for RM10 million each, amounting to RM40 million had been paid to the first defendant as full purchase price for the 192 units of shop offices – which were never built. Learned counsel for the appellant drew our attention to the respondent's statement of claim which pleaded a sum of RM39,853,350 as the total contract price for the 192 units – which was less than RM40 million. We also noted that two out of the four cheques were dated earlier than the contract date of 6 January 1997. The first cheque was dated 20 December 1996, the second one, 2 January 1997, the third cheque 6 January 1997 and the final one, 9 January 1997. If this allegation was true, it certainly raised a very curious question as to why the respondent could have parted with RM20 million before any contract was made, and paid up a massive sum of RM40 million before any construction was done – when in fact the contract required instalment payments to be made according to the progress of construction. My learned brother Jeffrey Tan Kok Wha, JCA noted that the respondent's director Tan Aik Teck actually deposed in his affidavit dated 8th May 2002 that he "checked through the plaintiff's records and hereby produce four cheques issued in favour of the first defendant totalling RM40 million." It was as if the originals of those four cheques were still in the respondent's possession. How could those four cheques have remained in the possession of the respondent if they had been used to make

payments to the first defendant? We also noted that those four cheques, photocopies of which were exhibited in *Tan Aik Teck*'s said affidavit, were personal cheques of some unknown person, and not cheques issued by the respondent. The company search results of the respondent company (exhibited in an affidavit filed in the High Court) disclosed that the respondent company had neither asset nor liability of RM40 million. Hence, this fact begs the question as to how the respondent, which is a private limited company incorporated in Malaysia, could have had the means of making payments amounting to RM40 million, allegedly by way of four RM10 million cheques paid in December 1996 and January 1997.

[8] The respondent had attempted to boost its case by submitting that in its application to lodge private caveats, it had mentioned full payment of contract price (allegedly) made to the first defendant. Further, it was submitted that in one of the contracts made involving the appellant, the appellant had apparently agreed to take-over the liabilities of the first defendant but did not mention any liability due to the respondent. The short answer to the respondent's submission is that those caveats would serve to prevent the first defendant from transferring its caveated lands to the appellant or to any third party but they would not *ipso facto* create any cause of action of "conspiracy to defraud" against a third party who knew of the existence of those caveats. My learned brother KN Segara, JCA hit the nail on the head when His Lordship pointed out to the respondent's counsel that his client should have made progress payments according to the Sale and Purchase Agreement, and need not have made any payment because the first defendant never built any of those 192 shop offices. The respondent had full knowledge that the first defendant's lands were charged to MBSB and could not have been transferred to anybody until and unless the charges have been discharged. If the respondent did indeed pay the first defendant as it alleged, it has done so at its own peril and cannot be allowed to use its own folly to create a cause of action against a stranger. Unless the respondent has some other undisclosed evidence to adduce, it simply cannot sustain any claim against the appellant based on a contract made between the appellant and the first defendant. There is no privity of contract to enable the respondent to rely on contracts made between the first defendant and third parties – which were not intended to benefit the respondent.

[9] The respondent had also attempted to plead constructive trust, alleging that the appellant is a "constructive trustee" for the respondent for "192 parcels". This allegation is again clearly unsustainable because as highlighted above, the first defendant never built any of those 192 units of shop offices. As the respondent had only exhibited one out of the 192 Agreements, there was no evidence before us of the supposed location of the other 191 units of shop offices – which were never built by the first defendant. Hence, the subject matter of the alleged constructive trust did not even exist.

[10] We were well aware of the rule that it is not the court's function at this stage of the litigation to try to resolve any conflict of evidence on affidavit. However, we have considered the respondent's case based on its own statement of claim and affidavits, and thereby arrived at the inevitable conclusion that the respondent had failed to show *bona fide* serious issues for trial to justify an interlocutory injunction. There was absolutely no privity of contract between the respondent and appellant. The respondent's allegation of payment of RM40 million in its affidavit contradicted its own statement of claim as well as its own accounts filed with the Companies Commission of Malaysia.

[11] Further, damages are obviously adequate remedy because the respondent's cause of action against the second defendant is based solely on an allegation of "conspiracy to defraud". It is trite law that no interlocutory injunction ought to be issued in this kind of situation. In *Saw Seng Kee v. Director of Lands & Mines, Penang & Ors.; Teoh Han Che v. Director of Lands & Mines, Penang & Ors.* [1986] 1 LNS 77; [1987] 1 MLJ 80, Edgar Joseph Jr. J held that if damages would be adequate remedy, there is no need to consider the further question of balance of convenience. His Lordship held at pp. 81 to 82 of the report:

> In the *Cyanamid* case, Lord Diplock made the same point at page 408 B & C in the following terms:
>
> > The court should first consider whether, if the plaintiff were to succeed at the trial in establishing its right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages ... would be adequate remedy and the

> defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.
>
> In these circumstances, as I had no doubt as to adequacy of the plaintiffs' remedy lying in damages should they succeed in their claims at the final hearing, there was no need for me to consider the further question of the balance of convenience (see the *Cyanamid* case at p. 408).

[12] As pointed out above, the respondent had a cause of action for breach of contract against the first defendant. Counsel for the respondent informed us that judgment had been entered against the first defendant but the first defendant had been wound-up. In this situation, all that the respondent could do is to join the other unsecured creditors of the first defendant to await distribution of dividend, if any, from the liquidator. The fact that the first defendant has been wound-up certainly did not give the respondent any additional right to make a claim against the appellant.

Conclusion

[13] For the reasons adumbrated above, we were satisfied that the learned High Court judge had erred in issuing the interlocutory injunction against both defendants. And since the respondent had given an undertaking to pay damages to the appellant if the appellant had suffered any damages by reason of the said injunction, the appellant is at liberty to apply for damages to be assessed by the High Court and paid by the respondent. Thus, we unanimously allowed the appellant's appeal with costs here and below to the sum of RM25,000 only, ordered the interlocutory injunction dated 5 September 2002 against the appellant to be set aside forthwith, and the appellant's deposit to be refunded.